79-3014

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

CENTRAL LONG ISLAND TAX REFORM IMMEDIATELY COMMITTEE, EDWARD COZZETTE, TAX REFORM IMMEDIATELY,

Defendants,

JOHN W. ROBBINS,

Intervenor-counterclaiming defendant.

Proceeding on Order Certifying Constitutional Questions by the United States District Court for the Eastern District of New York

BRIEF FOR PLAINTIFF

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STATEMENT OF ISSUES PRESENTED

Presented for review by this court are constitutional questions concerning certain provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq.,[1/] certified by order of the United States District Court for the Eastern District of New York. These questions were certified pursuant to 2 U.S.C. § 437h which provides that in actions "appropriate to

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1/ Hereinafter "FECA" or "the Act." The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) was amended as follows: Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); Federal Election Campaign Act Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1655 (1977).

construe the constitutionality" of the Federal Election Campaign Act the district court shall "certify all questions of the constitutionality of [the] Act" to the court of appeals.[2/]

The constitutional questions certified by order of the district court are set forth in Appendix I to this brief. They may be summarized as follows:

> 1. Whether Congress may constitutionally require persons other than candidates or political committees to report expenditures for communications which expressly advocate the election or defeat of federal candidates (§ 434(e)) and to disclose whether or not a candidate authorized those expenditures (§ 441d)?
>
> 2. Whether Congress acted consistent with the first and fifth amendments by providing that complaints of violations of the Act be processed by the Commission in strict confidentiality through three separate intervals of "reason to believe," "reasonable cause to believe," and "probable cause to believe" that violations of FECA had occurred, with procedures for informal conciliation by the Commission?

The district court also certified a question of whether the sections in question can constitutionally be applied to defendants herein, a question as to the constitutionality of a regulation promulgated pursuant to FECA, questions as to the constitutionality of the Commission's attempts to enforce the Act, and two questions of statutory construction. For reasons set

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2/ 2 U.S.C. § 437h is set forth in full in the Commission's Appendix II at 11-19.

forth by the Federal Election Commission[3/] in its memorandum of law filed with this court in this case on April 4, 1979, and herein at 7, the Commission maintains that these questions are not "appropriate to construe the constitutionality" of FECA and thus were not properly certified to this court for hearing en banc pursuant to 2 U.S.C. § 437h. However, since the court has requested the parties to present argument on all issues certified, both constitutional and statutory, the Commission has set forth arguments related to these issues:

> (1) The constitutionality of 2 U.S.C. §§ 434(e), 441d as applied to CLITRIM's distribution of the TRIM 1976 election bulletin;
>
> (2) The constitutionality of 11 C.F.R. § 109.1(b)(2);[4/]
>
> (3) The constitutionality of the Commission's enforcement attempts in this case;
>
> (4) The construction of the term "expressly advocating" as used by Congress in 2 U.S.C. §§ 434(e), 441d;

3/ Hereinafter "the Commission". The Federal Election Commission is "composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and six members appointed by the President of the United States, by and with the advice and consent of the Senate." 2 U.S.C. § 437c. The Commission "administer[s], seek[s] to obtain compliance with, and formulate[s] policy with respect to "[FECA] and has "exclusive primary jurisdiction with respect to the civil enforcement" of the Act. 2 U.S.C. § 437c(b)(1).

4/ The district court's reference to 11 C.F.R. § 109.1(d)(2) in certified question No. 4 at 8, Appendix I is in error.

(5) The construction of the terms "news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication" as used by Congress in 2 U.S.C. § 431(f)(4)(A) and by the Commission in 11 C.F.R. § 100.7(b)(3).

STATEMENT OF THE CASE

This case originated before the United States Court for the Eastern District of New York as a civil enforcement action filed by the Commission on August 1, 1978, against the Central Long Island Tax Reform Immediately Committee (hereinafter "CLITRIM"), Edward Cozzette, and Tax Reform Immediately (hereinafter "National TRIM"). The jurisdiction of the district court was invoked pursuant to 2 U.S.C. § 437g(a)(5), and 28 U.S.C. §§ 451, 1345.

The case arose from an administrative complaint filed with the Commission pursuant to 2 U.S.C. § 437g which charged that CLITRIM had failed to comply with two requirements of the Act when it printed the statements about Congressman Ambro in its 1976 Election Bulletin:

(1) it had not stated on the material who financed the bulletin and whether it was or was not authorized by a candidate as required by 2 U.S.C. § 441d, and

(2) it had not reported the costs involved in financing the statements as required by 2 U.S.C. § 434(e), on FEC Form 5. 5/

5/ FEC Form 5 is attached as Appendix III.

In accordance with the procedures set forth at 2 U.S.C. § 437g, the Commission, after seeking information from CLITRIM, concluded that there was reasonable cause to believe that the materials in question required the authorization/nonauthorization notice and reporting of costs, finding that these costs came within the statutory definition of materials intended to advocate the election or defeat of a named candidate. The Commission, as required by the Act, sought "to correct or prevent such violations by informal methods of conference, conciliation and persuasion." CLITRIM and its Chairman, Edward Cozzette, declined on essentially the same grounds that they had asserted when the Commission first sought information from them concerning the 1976 Election Bulletin and which they raise herein, i.e., the Act does not and cannot constitutionally require the organization publicly to provide that information about the communications in question. During the conciliation proceedings, representatives of National TRIM appeared on behalf of CLITRIM. The Commission's civil complaint in the district court sought enforcement of the provisions against the 1976 Election Bulletin printed by CLITRIM, naming National TRIM as a defendant necessary for relief.

The constitutional defenses were raised before the district court by defendant National TRIM in its answer and counterclaim, by defendants Edward Cozzette and CLITRIM in their motion to dismiss and/or for summary judgment, and by intervenor John Robbins in his motion to intervene. On January 25, 1979, the

district court, noting these contentions, sua sponte, certified certain questions concerning the constitutionality of FECA which "have been raised in this case."

This court, in orders dated April 23, 1979 and May 2, 1979, took jurisdiction, granted the motion for intervention and remanded the proceedings to the United States District for the Eastern District of New York to:

(1) Identify constitutional and fact issues raised in this case;

(2) Direct the entrance of stipulations and take whatever evidence the court finds necessary to a decision of these issues;

(3) Make findings of fact;

(4) Certify to this court, as soon as reasonably possible, the record and constitutional questions arising therefrom.

After certification by the district court, this court, in its order dated September 10, 1979, requested the parties to this action to respond to the certified constitutional issues, specifically the constitutionality of: (a) 2 U.S.C. § 434(e) which requires the disclosure to the Commission of independent expenditures, if, in the aggregate, they exceed $100, by persons other than political committees or candidates; and (b) 2 U.S.C. § 441d which requires a notice concerning authorization and financing to be included on communications expressly advocating the election or defeat of a clearly

identified federal candidate; and (c) 2 U.S.C. § 437g, which details the procedures which the Commission must follow in processing complaints filed with it.[6/] The Commission supports the constitutionality of these challenged provisions.

ARGUMENT

I. 2 U.S.C. § 437h PROVIDES ONLY AN EXPEDITIOUS REVIEW MECHANISM FOR APPROPRIATE QUESTIONS CONCERNING THE FACIAL CONSTITUTIONALITY OF FECA AND DOES NOT EXTEND TO ISSUES OF STATUTORY CONSTRUCTION, TO THE COMMISSION'S ENFORCEMENT OF FECA, OR TO REGULATIONS PROMULGATED THEREUNDER.

FECA's expedited review provision, 2 U.S.C. § 437h, was enacted by Congress as a special mechanism to provide prompt judicial consideration of constitutional questions raised during congressional consideration of the Federal Election Campaign Act Amendments of 1974.[7/] This unique jurisdictional provision, was introduced on the floor of the Senate by Senator Buckley during consideration of S. 3044, the Federal Election Campaign Act Amendments of 1974.[8/] Congressional debate indicates that Senator Buckley offered the provision specifically to provide

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6/ 2 U.S.C. §§ 434(e), 437g, 441d are set forth in full in the Commission's Appendix II at II-7, II-15, II-23.

7/ See note 1 supra.

8/ 119 Cong. Rec. 10,562 (1974) (remarks of Sen. Buckley).

prompt judicial review of certain new provisions of the 1974 amendments which he considered unconstitutional. 9/ This amendment was accepted by Senator Cannon (the manager of the bill) without debate or discussion. Senator Buckley defined the purpose of the amendment as follows:

> It merely provides for the expeditious review of the constitutional questions I have raised. 10/

On June 26, 1974, the Committee on House Administration drafted the House version of the Federal Election Campaign Act Amendments of 1974 which was introduced in the House as H.R. 16090. Congressman Frenzel proposed an amendment which was identical to Senator Buckley's floor amendment. Mr. Frenzel stated:

> This is a Judicial Review amendment and its intent is simply to speed up a Judicial Review on the Constitutionality of any Section of this particular bill. It was known as the Buckley amendment in the Senate and . . . it seems to me it is a good idea to have a process that offers a chance for speedy review of questions on the bill. 11/

9/ Id.; Martin Tractor v. Federal Election Commission, 460 F. Supp. 1017, 1019 (1978), appeal docketed, No. 78-2080 and consolidated with No. 79-1027 (D.C. Cir. Nov. 6, 1978).

10/ See note 8 supra.

11/ House of Representatives Committee on House Administration, 93d Cong., 2d Sess., Markup - Federal Election Campaign Act Amendments of 1974 at 704 (Transcript of Proceedings, June 26, 1974). Since the transcript of the markup session is a public document, but not reprinted in any readily available fashion and since it is the only legislative discussion which counsel for the Commission have discovered concerning the en banc requirement of § 437h, the Commission has attached a copy of said transcript in the Commission's Appendix V.

Discussion in the markup session on this provision centered upon the multiplicity of suits it might encourage in federal courts and the accompanying strain on federal judges in light of the requirement that appellate review be by en banc hearing. There did seem to be some confusion as to the nature of an en banc proceeding in the markup session, however, and at least one member questioned the power of Congress to tell the courts "how they should sit and when they should sit."[12/]

The provision of the House bill became § 207(c) of H.R. 16090, as introduced. It added § 315 to the Federal Election Campaign Act and was essentially identical to the provision introduced by Senator Buckley and adopted by the Senate. Moreover, the Conference Report stated:

> The Conference substitute generally follows the House amendment and makes it clear that these special judicial review provisions are available only for actions directed at determining the constitutionality of provisions of the Act and of provisions of title 18, United States Code, related to the activities regulated by the Act.

H.R. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess. 96 (1974). Thus, in conference, the conferees accepted the House version of Senator Buckley's extraordinary provision. This became 2 U.S.C. § 437h.

In addition, Congress created the Federal Election Commission to handle complaints of violations of the Act, placing

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12/ Id. at 708 (remarks of Rep. Annunzio), Appendix V.

those in which it found probable cause to believe before the federal courts through what became 2 U.S.C. § 437g(a)(5), and provided for judicial review of Commission action by "any party aggrieved" through what became 2 U.S.C. § 437g (a)(9).[13/] Congressman Hays characterized the intent of Congress when he stated:

> . . . the delicately balanced scheme of procedures and remedies set out in the Act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein . . . .

119 Cong. Rec. 35,134 (1974) (remarks of Rep. Hays). The Federal Election Campaign Act Amendments of 1976, supra, maintained this balance of rights and remedies.[14/]

As has been described, Senator Buckley's specific intent in introducing the amendment which became § 437h was to provide a means for an expedited challenge to provisions of the Act then under consideration, and prior to the existence of a Commission which might interpret them, which he considered unconstitutional on their face. There is no indication in the legislative history that Congress contemplated that § 437h would also open up a means for parties to take advantage

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13/ Both provisions were subsequently amended to their present form by Sec. 109 of the Federal Election Campaign Act Amendments of 1976, supra.

14/ The 1976 Amendments added the present 2 U.S.C. § 437g(a)(9) which provides judicial relief for persons aggrieved by an order of the Commission dismissing a complaint or failing to act on a complaint filed by such person.

of the extraordinary § 437h proceeding to attack interpretations or applications of the Act, to attack regulations promulgated pursuant to the Act, or to seek construction of the statute.[15/] The very wording of the statute implies otherwise in providing for actions "to construe the constitutionality of provisions of the Act." (Emphasis added).

Clearly, the legislative history of § 437h also indicates that Congress intended this extraordinary provision to be a mechanism available to certain classes of persons or entities who raised those limited issues "appropriate to construe the constitutionality" of FECA. To permit review of the application of the statute under § 437h or to permit certification of issues of statutory construction would clearly extend the § 437h procedure

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15/ The United States District Court for the District of Columbia has concluded that § 437h was not applicable to actions challenging the constitutionality of Commission regulations. National Conservative Political Action Committee v. Federal Election Commission, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057 (D.D.C. 1978), appeal docketed, No. 78-1543 (D.C. Cir. June 15, 1978). The court stated:

> The other statutory provisions invoked by plaintiffs do not afford a basis for jurisdiction over the alleged activities of the DNC. This case does not involve questions relating to the constitutionality of provisions of the Act and therefore 2 U.S.C. § 437h has no application here. See Buckley v. Valeo, 424 U.S. 1 (1976); Clark v. Valeo, 559 F.2d 642 (D.C. Cir. 1977).

Id. at 50,515, n.6 (April 28, 1978), appeal on other issues docketed, No. 78-1543 (D.C. Cir. June 15, 1978).

beyond its limiting words and beyond congressional intent. Congress plainly articulated that § 437h was intended to provide an avenue for review of constitutional challenges to FECA and the very language of the statute testifies to this limited purpose.[16/]

Therefore, the questions as to the application of the Act, the Commission's regulation and the statutory questions certified by the district court are not properly before this court for consideration since § 437h should be restricted to the review of constitutional challenges to the Act.[17/] This court should return the improperly certified questions unanswered to the district court for determination in the course of the Commission's enforcement proceeding in that court.[18/]

16/ Analogously, certification of questions to the Supreme Court pursuant to 28 U.S.C. § 1254(c) has been limited to discrete questions or propositions of law properly certified, United States v. Mayer, 235 U.S. 55 (1914); Warner v. New Orleans, 167 U.S. 467 (1897); not to mixed questions of law and fact, Hallowell v. United States, 209 U.S. 101 (1908); and not to hypothetical or speculative questions, United States v. Mayer, supra. Thus, § 437h should be limited to questions of the facial constitutionality of FECA properly certified.

17/ See the Commission's Appendix IV which provides a list of cases which have been brought pursuant to 2 U.S.C. § 437h and their current status in the courts.

18/ FECA's enforcement provision, 2 U.S.C. § 437g, itself contains an expedition provision and specifically provides the avenue of certification of questions of law to the Supreme Court under 28 U.S.C. § 1254(c). See 2 U.S.C. §§ 437g(a)(10), (11) set forth in full in the Commission's Appendix II at II-18, II-19.

II. 2 U.S.C. §§ 434(e), 441d ARE PRECISE, NARROWLY DRAWN STATUTES CONSISTENT WITH THE FIRST AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The two substantive provisions of the Act here challenged are part of the overall reporting and disclosure scheme enacted by Congress in 1974, reviewed by the Supreme Court in Buckley v. Valeo, 424 U.S. 1, 60 (1976), and amended by Congress in 1976 in light of that decision. That overall scheme provides for detailed reporting of all contributions and all expenditures by political committees and candidates. Though not directly here at issue, the Supreme Court's conclusion that this overall reporting structure is constitutionally sufficient sets the context for the challenge herein to the more limited reporting and disclosure provisions.

The Court in Buckley, recognized the substantial governmental purpose in requiring disclosure and reporting, i.e.,

> ...[D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office.

Id. at 66, quoting H.R. Rep. No. 92-564, 92d Cong., 1st Sess. 4 (1971);

> ...[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.

Id. at 67, citing S. Rep. No. 93-689, 93d Cong., 2d Sess. 2 (1974); and

> ...[R]ecordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations ...

Id. at 68. The Court thereafter concluded that the "disclosure requirements, as a general matter, directly serve substantial governmental interests...." and that, even as applied to minor parties and independents, "any serious infringement on first amendment rights brought about by the compelled disclosure of contributors is highly speculative." Id. at 68, 70. In rejecting a blanket exemption from FECA's reporting and disclosure provisions for minor parties and independents, the Court noted the opinion of Chief Judge Bazelon, dissenting in part to the court of appeals decision in Buckley, in which Judge Bazelon argued to the contrary. See Buckley v. Valeo, 519 F.2d 821, 907 n.1 (D.C. Cir. 1975) (Bazelon, C.J., dissenting).

The legislative history of FECA also demonstrates that the express purpose of the Act is to facilitate complete disclosure of campaign finance information as dictated by the need for an informed, knowledgeable electorate. Congressional debates evidence the fact that in drafting S.382, enacted as the FECA

of 1971, Congress believed that full disclosure requirements would encourage better campaigns while providing a powerful stimulus for campaign reform to strengthen public confidence in its representatives.[19/] Congress also expressed concern, however, that the legislation comply with constitutional mandates. In this regard, Senator Dole, speaking on behalf of the amendments stated:

> Disclosure raises no doubts of infringement on fundamental first amendment freedom: whereas, any attempt to circumscribe the rights of contributors to support - and candidates to conduct - political campaigns certainly calls to mind an entire range of constitutional issues which, even if resolved in their favor, might require years of litigation and controversy to be finally settled. Disclosure is much more in keeping with the American philosophy of providing incentives to political action than is limitation. Disclosure would provide strong impetus to better campaigning, while limitations would only intensify present deficiencies. And in this day of widespread apathy and disillusionment with public affairs, instead of throwing up more barriers in the political system, we should be opening new channels to its best and most advantageous functioning. 20/

The Court in Buckley interpreted the extent of these reporting and disclosure provisions to include "spending that is unambiguously related to the campaign of a particular federal candidate." Buckley, 424 U.S. at 80.

19/ 117 Cong. Rec. 30,074 (1971)(remarks of Sen. Dole); 117 Cong. Rec. 42,074 (1971) (remarks of Rep. Harvey).

20/ 117 Cong. Rec. 30,074 (1971)(remarks of Sen. Dole).

The constitutional questions certified by the United States District Court for the Eastern District of New York in this case challenge the constitutionality of the disclosure requirements enacted by Congress in the Federal Election Campaign Act, as amended.[21/] Specifically, the certified questions inquire whether 2 U.S.C. §§ 434(e), 441d are vague and overbroad in violation of the first and fifth amendments to the Constitution of the United States. The Commission, for the reasons set forth, infra, answers these certified questions to support the constitutionality of the provisions.

The complementary reporting and disclosure provisions of 2 U.S.C. §§ 434(e), 441d were enacted by Congress to comply with the Supreme Court's holding in Buckley v. Valeo, 424 U.S. 1 (1976), which upheld the governmental interest

> to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible.

Buckley, 424 U.S. at 76. In order for this court to find these statutes constitutionally violative, it must reverse the Supreme Court which held that the burden

> imposed by § 434(e) is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the

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21/ See note 1 supra.

> basic processes of our federal election system to public view.

Buckley, 424 U.S. at 82.[22/]

Sensitive to the constitutional concerns expressed by the Supreme Court in Buckley, Congress re-enacted 2 U.S.C. § 434(e) as part of the Federal Election Campaign Act Amendments of 1976.[23/] Congress eliminated the criminal penalties which attached to the provision under review in Buckley, limited disclosure under § 434(e) to reporting of "contributions or expenditures which in the aggregate exceed $100 and which expressly advocate the election or defeat of a clearly identified candidate," and

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22/ The FECA, as amended, is an exercise of Congress's constitutional duty to regulate federal elections. U.S. Const. art. 1, sec. 4; As such, it should be accorded a "presumption of constitutionality." Town of Lockport v. Citizens for Community Action at the Local Level, Inc., 430 U.S. 259, 272 (1977); See also Burroughs v. United States, 290 U.S. 534 (1934)(It is within Congress' power to "pass appropriate legislation to safeguard [a Presidential] election from the improper use of money to influence the result.") Id. at 545. FECA's disclosure requirements were closely scrutinized during congressional deliberations concerning the FECA amendments of 1976 during which Senator Kennedy noted that

> "we have every right to expect that, any time individuals are spending money, we are entitled to very clear notice as to who is spending, how much is being spent and who receives the benefits."

Hearings on S.2911, S.2911 - Amdt. No. 1396, S.2912, S.2918, S.2953, S.2980 and S.2987 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 94th Cong., 2d Sess. 77 (1976)(statement of Sen. Kennedy).

23/ See note 1 supra. Disclosure requirements for contributions and expenditures in connection with federal elections began as early as 1910, Act of June 25, 1910, 36 Stat. 822. See Buckley v. Valeo, 424 U.S. at 61.

clarified the information to be disclosed. S. Rep. No. 94-677, 94th Cong., 2d Sess. 6 (1976).

As noted supra, § 434(e) is an intermediary reporting and disclosure provision which applies to persons, other than political committees and candidates, who make contributions and expenditures in excess of $100 in a calendar year which expressly advocate the election or defeat of a clearly identified [federal] candidate. Contrary to defendants' contentions in this case, the provision does not require full disclosure of all of an organizations' contributors. As the Supreme Court specifically held,

> [u]nlike the other disclosure provisions, this section does not seek the contribution list of any association. Instead, it requires direct disclosure of what an individual or group contributes or spends.

Buckley, 424 U.S. at 75. Recognizing that § 434(e) does not seek the contribution list of any association.... [but only] requires direct disclosure of what an individual or group contributes or spends," 424 U.S. at 75, the Court specifically found that the provision "does not contain the infirmities of the provisions before the Court in Talley v. California, 362 U.S. 60 (1960), and Thomas v. Collins, 323 U.S. 516 (1945)."[24/]

24/ In Talley, the Court struck down as violative of first amendment rights an ordinance which forbade distribution of handbills which failed to include the name of the printer, author, or manufacturer and distributor, and in Thomas, held a registration requirement for labor organizers an unconstitutional prior restraint on first amendment activity.

The Supreme Court in Buckley determined that § 434(e), as construed, bears a sufficient relationship to a substantial governmental interest, i.e.,

> to stem corruption or its appearances by closing a loophole in the general disclosure requirements..., to [increase] the fund of information concerning those who support [or oppose] the candidates..., [and to help] voters to define more of the candidates' constituencies." 25/

424 U.S. at 80, 81.

The limited nature of reporting and disclosure required by § 434(e) is important in assessing any possible infringement on first or fifth amendment rights.[26/] First, the section does not apply at all to expenditures or contributions made to conduct "issue-oriented information dissemination." It does not apply to contributions or expenditures made to publish nonpartisan unbiased voting charts on members of Congress. It does not apply to communications which do not "endorse or oppose the election of candidates." Section 434(e) would not be applicable to the advocacy of policy positions or the discussion of social action. It does not require disclosure of

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25/ A variety of descriptive phrases have been employed by the courts in evaluating the sufficiency of the governmental interest, e.g., "compelling," NAACP v. Button, 371 U.S. 415, 438 (1963); "substantial," NAACP v. Alabama, 357 U.S. 449, 464 (1958); "subordinating," Bates v. Little Rock, 361 U.S. 516, 524 (1960); "paramount," Thomas v. Collins, 332 U.S. 516, 530 (1945); "cogent," Bates, supra; or "strong," Sherbert v. Verner, 374 U.S. 398, 408 (1963).

26/ See FEC Form 5 attached in the Commission's Appendix IV for the precise disclosure format.

contributions or expenditures in connection with the preparation or distribution of position papers, "fact-sheets" or other non-partisan informational or educational material. Nor would § 434(e) apply to costs related to publication of a non-partisan congressional voting chart not advocating the election or defeat of certain members of Congress.[27/]

Moreover, the 1976 FECA amendments, which the Commission sought to enforce by bringing the civil enforcement action in the district court and which the Commission defends against constitutional attack herein, were strictly scrutinized by Congress in relation to their impact on individual rights as guaranteed by the first amendment.[28/] In its report to accompany H.R. 12406, the Committee on House Administration stated that the independent expenditure provisions were specifically designed to disseminate the maximum amount of information to the voting public in a reasonable manner which placed "comparable" reporting and disclosure requirements on candidates and on individuals and groups making

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27/ See the findings of the district court at Nos. 7 at 13, 4 at 55, 4 at 63, 6 at 68, 7 at 70, 11 et seq. at 71, 2 et seq. at 75, Appendix I; discussion of "express advocacy" infra at 42. The CLITRIM/TRIM election materials are not non-partisan, unbiased voting charts such as those identified by the district court in its Findings.

28/ See Hearings, supra note 22 at 141.

independent expenditures.[29/] The Committee explained that the 1976 FECA amendments were the direct product of problems which arose regarding regulation of federal elections prior to 1971, specifically the proliferation of political committees "ostensibly separate" from but which in fact aided federal campaigns.[30/] First and foremost however, Congress was necessarily required to protect the full enjoyment of the individual's first amendment rights in this area. Therefore, it is evident that in drafting and amending provisions designed to insure that independent expenditures would be disclosed, and would not be utilized as a subterfuge to circumvent direct contribution limitations and disclosure requirements, Congress consistently intended to remain within the limitations of the constitution. More significantly, the 1976 amendments to FECA were drafted to follow explicitly the mandate of the Supreme Court in Buckley v. Valeo, supra.

While the § 441d disclosure requirement was not specically before the Buckley Court, a similar provision, 18 U.S.C. § 612, had been held constitutional in United States v. Scott, 195 F. Supp. 440 (D.N.D. 1961). And, as discussed, infra, Congress specifically enacted § 441d in 1976 to meet the

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29/ H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 5 (1976).

20/ Id.

constitutional guidelines set forth by the Supreme Court in Buckley.[31/] It is clear that § 441d serves the same legitimate governmental interest, as is served by § 434(e), by providing disclosure to the voting public of authorization or nonauthorization by a candidate and financing information on communications expressly advocating the election or defeat of federal candidates. This valid public disclosure provision is not a prior restraint of speech protected by the first amendment since it does not restrain speech or speech activity in any manner. It merely requires that express advocacy communications contain disclosure provisions and that if they do not, a violation of FECA will have occurred.

The disclosure requirements of 2 U.S.C. § 441d are even more limited than the §434(e) requirements found constitutional in Buckley. The section requires only that express advocacy communications contain a statement disclosing to the public whether or not the communication was authorized by a candidate and who financed the communication. Thus, CLITRIM's '76 Election Bulletin would have complied with § 441d if it had contained a statement such as:

> This bulletin was not authorized by any candidate and was financed by Central Long Island Tax Reform Immediately Committee.

31/ Congress incorporated the "expressly advocating" language of the Supreme Court in § 441d and the Commission, in promulgating its regulations adopted the Court's examples of words which could constitute "express advocacy". 2 U.S.C. § 441d; 11 C.F.R. § 109.1(b)(2); Buckley v. Valeo, 424 U.S. at 44, n.52. See discussion of "express advocacy" infra at 42.

See also 11 C.F.R. § 109.4, Appendix II-27. This is an extremely precise, limited provision designed to notify the public concerning the financial backing for political statements advocating the election or defeat of federal candidates. It does not require the disclosure of the names of individuals who are members or officers of the group financing the communication. It does not even require that the group's address be included. Surely, this limited public disclosure is not vague and does not represent a prior restraint of first amendment rights.[32/]

Section 441d was also enacted by Congress as part of the FECA amendments of 1976. It was designed to replace 2 U.S.C. § 437a which had been found to be unconstitutionally vague by the United States Court for Appeals of the District of Columbia Circuit in Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1976), a decision not appealed to the Supreme Court. Section 441d also revised

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32/ The challenged provisions will only be held void for vagueness if "men of common intelligence must necessarily guess at its meaning and differ as to its application...." Baggett v. Bullitt, 377 U.S. 360, 367 (1964). Certainly the requirements of § 441d can be understood by "men of common intelligence." See also Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961); United States v. Harriss, 347 U.S. 612, 617 (1954); Jordan v. DeGeorge, 341 U.S. 223, 230-32 (1951); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Construction Co., 269 U.S. 385, 391 (1926); United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921); International Harvester Co. v. Kentucky, 234 U.S. 216, 223-24 (1914).

18 U.S.C. § 612 and was made subject to the penalty and enforcement provisions of the Act.[33/]

This court should, then, consider exactly what would be required of defendants herein to meet the mandates of disclosure pursuant to 2 U.S.C. §§ 434(e), 441d. The § 434(e) disclosure responsibilities are only triggered when individuals or organizations other than political committees or candidates make

> "contributions or independent expenditures expressly advocating the election or defeat of a clearly identified [federal] candidate, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 during a calendar year."

2 U.S.C. § 434(e), Appendix II at II-7. This reporting and disclosure provision does not apply to contributions or expenditures made to discuss issues of national importance or of importance to the organization. It does not apply to expenditures made to provide educational materials. It does not apply to communications discussing legislation, lobbying efforts or Congressional voting records which are not geared towards advocating the election or defeat of certain members of Congress. It is only when an individual or group spends in excess of $100 to expressly advocate the election or defeat of federal candidates that § 434(e)

33/ S. Rep. No. 94-677, 94th Cong., 2d Sess., 11 (1976). 18 U.S.C. § 612 was a criminal statute regulating the publication or distribution of political statements which was held constitutional by the district court in United States v. Scott, 195 F. Supp. at 440.

applies. Similarly, individuals or groups need only comply with § 441d provision when they expend funds to publish materials expressly advocating the election or defeat of a federal candidate.

The Commission readily acknowledges that "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and....changes may be obtained by lawful means...[is] a fundamental principle of our constitutional system." Stromberg v. California, 283 U.S. 359, 369 (1931). See also Greenbelt Publishers Association, Inc. v. Bresler, 398 U.S. 6, 11 (1970). In this regard, the John Birch Society, which publishes the monthly John Birch Society Bulletin and the TRIM Newsletter and the quarterly TRIM Bulletin, has regularly engaged in issue-oriented information dissemination since its inception in 1958. Findings No. 4 and 7 at 13, Appendix I. By this civil action, the Commission does not seek to restrict such activity. Rather, the Commission seeks to enforce "reasonable and minimally restrictive" disclosure requirements in connection with those TRIM activities which "unambiguously relate to the campaign of a particular federal candidate," i.e., to phrase it in the words of TRIM coordinators, precisely those "election effort" activities calcuated to "get...or beat

particular federal candidates. Finding No. 7 at 44-45 and Finding No. 8 at 38, Appendix I.[34/]

Thus, the challenged provisions are limited in their scope, extending only to "express advocacy" activity, and indeed, in no sense can be considered a prior restraint on first amendment activity since they merely state the requirements for compliance with FECA and provide penalties for non-compliance. See discussion of FECA's enforcement procedures infra at 30. Such a statute which merely provides civil penalties for its violation will not be considered a prior restraint. Paramount Film Distributing Corp. v. City of Chicago, 172 F. Supp. 69, 70 (D.N.D. Ill. 1959). See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Freedman v. Maryland, 380 U.S. 51 (1965). The Supreme Court has recognized this distinction between suppression or censorship and regulation. Poulos v. New Hampshire, 345 U.S. at 395, 408 (1953) citing Near v. Minnesota, 283 U.S. 697, 712 (1931). FECA neither provides for nor does the Commission seek to impose any form of prior censorship on material to be published and distributed by the defendants or any other "person" as defined by the Act. 2 U.S.C. § 431, Appendix II at II-6. Defendants are free to distribute political materials as guaranteed by the first amendment.

34/ See "express advocacy" discussion setting forth that the CLITRIM/National TRIM bulletins are not merely informational or educational compilations, but are in fact "express advocacy" communications infra at 39.

Effectively, defendants' argument that the Act is unconstitutional rests upon their position that Congress cannot require the reporting of "unambiguously campaign-related" expenditures by groups such as themselves. Thus, defendants make only the general "fear of harassment as a result of compelled disclosure" argument which was raised by the parties in Buckley and rejected by the Supreme Court. The Court in Buckley held:

> [No] appellant in this case has tendered record evidence of the sort proffered in Alabama....where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied.... At best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure. On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged. Buckley, 424 U.S. at 72.

The district court's Findings adopted general statements by defendants and others alleging some element of unpopularity, e.g.,

(1) that "[t]he John Birch Society has a history of vilification in the public press..." Finding No. 10 at 14, Appendix I;

(2) that [m]embership in [the John Birch Society] ...is controversial in many parts of the country." Finding No. 12 at 15, Appendix I.

(3) that the "Society and its members have experienced a significant number of incidents of harassment..." Finding No. 13 at 15, Appendix I.

(4) that "[a] significant number of contributors to the Socety...do so only on the condition that their names will not be disclosed." Finding No. 16 at 16, Appendix I.

(5) that "[a] significant number of contributors to the local TRIM committees would not contribute if to do so would mean" disclosure of their names. Finding No. 18 at 16, Appendix I.

However, such vague allegations of unpopularity do not constitute "harassment" as defined by the Court in Buckley.[35/] The Court specifically rejected this argument in Buckley, holding that "clearly articulated fears" by "unpopular" groups concerning the effects of FECA's and even some reduction in contributions to such groups were not enough to outweigh the "substantial public interest in disclosure." Buckley, 424 U.S. at 71. In short, Buckley upheld the general disclosure provisions of FECA even as applied to organizations which claim some degree of unpopularity.[36/] Indeed, the possible exemption noted in Buckley, based upon a demonstration that there is "a reasonable probability that the compelled disclosure of...contributors names will subjec them to threats, harassment, or reprisals from either Government officials or private parties" is less compelling in the context of the more limited provisions at issue here, §§ 434(e), 441d, which do not require disclosure of contributors' names.

35/ The district court's finding of harassment was apparently based upon a misconception of the legal definition of "harassment" as set forth in Buckley. The Commission contests that these factual findings as supported in the record constitute "harassment."

36/ The Commission also maintains that the findings of the district court concerning the "unpopularity" of the John Birch Society are not supported by evidence relating to the Society's current status in public opinion. Findings 1-14 at 14, Appendix I.

As recognized by the United States District Court for the District of Columbia, if the parties to this action contemplate that FECA's general disclosure provisions might apply to them, i.e., if they are now or in the future expand their activities to become a political committee, or if they believe that even the very limited disclosure required by §§ 434(e), 441d, i.e., identification on express advocacy materials and disclosure only of expenditures, is constitutionally violative when applied to them, the proper procedure is for that group, e.g., the John Birch Society or TRIM, to seek from the Federal Election Commission the development of

> a full factual record...concerning the present nature and extent of any harassment suffered by plaintiffs as a result of the disclosure provision...

Socialist Workers 1974 National Campaign Committee v. Federal Election Commission, C.A. No. 74-1338 (D.D.C., Jan. 17, 1977) (order remanding to the Federal Election Commission to develop such a factual record). And, even if the record developed did support a finding of "harassment" such that the disclosure of the names of members and contributors could not be constitutionally compelled, the committee would not be exempt from full recordkeeping and reporting as required by FECA. The organization or committee would merely be allowed to file sanitized reports deleting the "names, mailing addresses,

occupation and principal place of business of contributors..., political committees or candidates..., lenders, endorsers or guarantors..., and persons to whom expenditures have been made..." depending upon the level of reporting required. Socialist Workers, supra, (D.D.C. Jan. 3, 1979) (order, judgment and decree).

Therefore, this court should conclude that FECA's intermediary reporting and disclosure provisions, 2 U.S.C. §§ 434(e), 441d are neither vague nor overbroad nor do they operate as a prior restraint on protected first amendment activity. The statutory provisions withstand constitutional attack both as to the very precision of their words and as to their reach to groups which have experienced some degree of unpopularity.

III. FECA'S ENFORCEMENT MECHANISM, 2 U.S.C. § 437g, SETS FORTH A PRECISE DETAILED PROCEDURE FOR ADMINISTRATIVE APPLICATION OF THE ACT CONSISTENT WITH THE CONSTITUTION

The district court's certification herein questions whether the Commission's enforcement authority as set forth at 2 U.S.C. § 437g provides "adequate statutory standards to guide or limit the FEC in commencing an investigation." Finding No. 6 at 8, Appendix I. Defendants argue that § 437g amounts to an unconstitutional delegation of arbitrary authority which serves as a prior restraint on their first amendment activities.[37/] Defendants simply misconstrue § 437g and their procedural

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37/ See discussion of prior restraint, supra at 26.

due process allegations are, therefore, invalid. The elaborate enforcement mechanism enacted by Congress in FECA is clearly not a prior restraint of first amendment activity. Rather, it is a detailed administrative enforcement procedure specifically designed to protect against any possible encroachment on protected first amendment activity.[38/]

Under § 437g, FECA's enforcement provision, any person who believes a violation of the Act has occurred may file a notarized complaint with the Commission. 2 U.S.C. § 437g (a)(1). See also, 11 C.F.R. § 111.2. Upon the filing of such a complaint, and after separate findings, by an affirmative

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38/ Contrary to defendants' apparent contention herein that Congress vested too much authority in the Commission, the Campaign Finance Study Group, in its Final Report to the Committee on House Administration of the United States House of Representatives, recognized that, although

> "[t]he fundamental purposes of the FECA -- to prevent corruption and to reduce the influence of large donors in the funding of federal election campaigns -- cannot be accomplished effectively in the absence of a federal agency to monitor the flow of money in electoral politics[,]

in this sensitive area of political activity,

> a weak regulatory body is highly preferable to a strong one. Accordingly, the Congress has sought to constitute a weak Federal Election Commission and it has achieved that desire.

The Study Group notes that the

> even number of Commissioners, the absence of a permanent chairman, requirements that Commission business proceed in deliberate stages of repetitive votes, the informal method by which Commissioners are chose, the provision of ex-officio members from the House and Senate, the "Congressional veto,"

as provisions which limit the Commission. The Campaign Finance Study Group, An Analysis of the Impact of the Federal Election Campaign Act, 1972-1978, Final Report, Section 6 (Harvard University, May 1979).

vote of four members of the Commission, of reason to believe and reasonable cause to believe that a violation occurred, the Commission must endeavor to correct or resolve the violation by informal methods of conference, conciliation and persuasion, and to formulate a conciliation agreement signed by all parties. Such a conciliation agreement, voluntarily entered into, may include a provision by which the person agrees to pay a civil penalty. 2 U.S.C. § 437g(a)(6).

If the Commission is unable to correct a violation by such informal methods, it may, if there is "probable cause to believe" a violation has occurred, institute a civil action in federal district court for civil enforcement of the Commission's determination. 2 U.S.C. § 437g(a)(5)(B). Such actions are to be advanced on the court's docket, 2 U.S.C. § 437g(a)(11), and, in such an action the court may issue an appropriate order "upon a proper showing that the person involved has engaged in...a violation of this Act....", 2 U.S.C. § 437g(a)(5)(C), and fashion any remedy it deems appropriate to the case at hand. See, e.g., Federal Election Commission v. Committee for a Constitutional Presidency - McCarthy '76, CCH Fed. Elec. Camp. Fin. Guide, ¶ 9074, (D.D.C. March 7, 1979). (district court found a violation of the Act but decided not to issue an injunction). Under § 437g(a)(10), a decision by a district court under this scheme may be appealed to the court of appeals, and, thereafter, to

the Supreme Court upon certiorari or certification pursuant to 28 U.S.C. § 1254.[39/] Thus, the requirements of procedural due process - notice and opportunity for hearing - are obviously met by § 437g. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

Moreover, the statutory standards of § 437g are carefully drawn precisely stated steps which seek to protect the rights of those concerned. The language used -- "reason to believe," "reasonable cause to believe," and "probable cause to believe" -- is certainly familiar in administrative law. As a matter of fact, the Commission, through the vehicle of a computer search, identified approximately 350 separate sections of the United

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39/ The legislative history of § 437g indicates that Congress envisioned the procedure as a safeguard to first amendment rights.

> "[T]he detailed enforcement procedures... will give the Commission a greater number of alternatives in enforcing the law, and at the same time afford a person who makes a good-faith attempt at compliance with the complex requirements of the Act a greater degree of protection than presently available."

122 Cong. Rec. 66937 (1976)(remarks of Sen. Cannon).

Responsibility for enforcement of the Act was originally vested in the Commission by the FECA of 1974. During Congressional debate, Congress made clear that the Amendments gave the Commission "primary jurisdiction in all election matters" and required that the Commission "seek to effect voluntary compliance through informal administrative procedures."
120 Cong. Rec. 35,132 (1974)(remarks of Rep. Brademas).

The Commission, as established, would "assure judicious, expeditious enforcement of the law, while reversing the long history of non-enforcement."
120 Cong. Rec. 35,135 (1974)(remarks of Rep. Frenzel).

States Code which employ the terms as standards or guidelines for administrative action. Thus, the Federal Trade Commission may certify facts to the Attorney General in anticipation of criminal prosecution based upon "reason to believe", 15 U.S.C. § 56, or may institute confiscation proceedings in federal court based upon "reason to believe," 15 U.S.C. § 1195(b); the Department of Agriculture may request the complaints and upon a finding of "reasonable cause to believe" that a violation of Title VII has occurred, must "endeavor to Attorney General to bring a civil action based upon "reasonable cause to believe," 7 U.S.C. § 2305; the Secretary of Labor may conduct investigations of union elections and bring civil actions thereafter based upon "probable cause to believe;" and the United States Court of Appeals for the Tenth Circuit, in reviewing the "reason to believe" standard set forth in 18 U.S.C. § 2153, held that the statute was not void for vagueness as the terms used therein were "sufficiently clear" to provide fair notice to "normally intelligent persons." United States v. Bishop, 555 F.2d 771, 774 (10th Cir. 1977), citing United States v. Achtenberg, 459 F.2d 91, 95 (8th Cir. 1972), cert. denied, 409 U.S. 932 (1972).[40/]

Moreover, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., employs a detailed administrative investigation and enforcement mechanism similar to FECA's. Thus,

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40/ See 16 U.S.C. §§ 776d, 959; 31 U.S.C. § 1105; 26 U.S.C. § 5713; 19 U.S.C. §§ 1337, 1592; 29 U.S.C. §§ 464, 482; 18 U.S.C. § 1968; 21 U.S.C. § 134E, for examples of other statutes employing "reason to believe," "reasonable cause to believe," or "probable cause" as standards or guidelines.

under 42 U.S.C. § 2000e-5, the Equal Employment Opportunity Commission (EEOC) conducts investigations based upon written complaints and upon a finding of "reasonable cause to believe" that a violation of Title VII has occurred, and must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion...." If EEOC fails at informal conciliation, it may bring a civil action for relief against the respondent within 30 days after the expiration of a mandatory conciliation period, a procedure strikingly similar to FECA's.[41/]

Indeed, it is difficult to imagine that a court could find the elaborate administrative process enacted by Congress in FECA unconstitutionally vague when the Constitution of the United States itself provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV (emphasis added). The standards of reasonableness and probable cause in the context of the fourth amendment have been defined by the Supreme Court in a long line of cases.[42/]

41/ The EEOC may not bring such a civil action against any respondent which is a government, government agency or political subdivision; these cases are referred to the Attorney General for further action. 42 U.S.C. § 2000e-5(f).

42/ United States v. Rabinowitz, 339 U.S. 56, 66 (1950) (whether search was reasonable or not "must find resolution in the facts and circumstances of each case."); Harriss v. United (continued)

And, even in cases involving seizure of materials entitled to the protection of the first amendment, although the courts have required the government to be more exact in its "probable cause" determinations, no court has found the procedure of the fourth amendment to be inexact. Stanford v. Texas, 379 U.S. 476, 485 (1965); A Quantity of Books v. Kansas, 378 U.S. 205, 210 (1964); Marcus v. Search Warrant, 367 U.S. 717, 732 (1961).

"Probable cause" is also used as a standard by grand juries in carrying out the constitutional mandate that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ..." U.S. Const. amend. V. "The role of a grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed." United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965). The grand jury, like the Commission pursuant to § 437g, "merely investigates and reports. It does not try." Hannah v. Larche, 363 U.S. 411, 449 (1960).

42/ continued
States, 331 U.S. 145 (1947), (defining a "reasonable" search); Dumbra v. United States, 268 U.S. 435, 439, 441 (1925). ("[T]he term 'probable cause'...means less than evidence which would justify condemnation.") Locke v. United States, 11 U.S. (7 Cr.) 339, 348 (1813); See Steele v. United States, 267 U.S. 498, 504-505 (1925). It may rest upon evidence which is not legally competent in a criminal trial, Draper v. United States, 358 U.S. 307, 311 (1959), and it need not be sufficient to prove guilt in a criminal trial. Brinegar v. United States, 338 U.S. 160, 173 (1949); See United States v. Ventresca, 380 U.S. 102, 107-108 (1965).

In sum, defendants, because of 2 U.S.C. § 437g, are afforded safeguards well beyond the requirements of due process. Certainly they have notice and, as this action shows, extensive opportunity for a full and fair hearing, both by way of submissions to the Commission in the administrative proceeding and in the federal courts which must render any final determination.[43/] The statutory language of § 437g, setting forth precise steps to be taken, is not unconstitutionally vague and, certainly the Commission's filing of civil action in federal court or that court's decision on the matter cannot be viewed as a prior restraint on first amendment activities.

43/ While the Supreme Court has not had occasion to review § 437g pursuant to a claim of procedural due process or vagueness, in a case which raised first amendment defenses, the Court concluded, after discussing the 1974 enforcement provisions, that the Commission was the appropriate entity to review the allegations in the first instance. Cort v. Ash, 422 U.S. 66, 76 (1975). See also Gabauer v. Woodcock, 594 F.2d 662, 673 (8th Cir. 1979), concluding that the same result obtains under the 1976 FECA amendments:

> "Congress explicitly expressed its desire to have the FEC engage in methods of conference, conciliation and persuasion before litigation ensues over any federal election laws. We should not permit circumvention of such negotiation under the guise of a parallel cause of action." Id. at 673. (citations deleted).

IV. THE COMMISSION'S APPLICATION OF FECA TO DEFENDANTS IS CONSISTENT WITH THE CONSTITUTION.

The district court's certification asked whether the application of FECA to "CLITRIM's distribution of the TRIM bulletin" is consistent with the constitution; whether the Commission's regulation, 11 C.F.R. § 109.1(b)(2) is constitutionally sufficient; and whether the Commission's efforts to enforce FECA in this case did not unconstitutionally infringe upon defendants rights. Although the Commission maintains that these questions were not properly certified pursuant to 2 U.S.C. § 437h, not being "questions of the constitutionality of this Act," the application of FECA to defendants in this case is clearly constitutional.

First, the district court questioned the constitutionality of the Commission's efforts to enforce FECA against defendants herein "because the FEC has commenced this enforcement proceeding against TRIM without making any effort at conciliation?" Finding No. 6(b) at 8, Appendix I. Initially, the Commission contests the district court's conclusion that "[p]rior to the institution of this action, the FEC did not seek conciliation with National TRIM." Finding No. 28 at 25, Appendix I.

The Commission's investigation of CLITRIM/National TRIM's activities in connection with the distribution of "express advocacy" communications prior to the 1976 election was instituted upon the filing of a written, signed, sworn, notarized complaint

filed with the Commission by one Daniel Mooney on April 5, 1977. See 2 U.S.C. § 437g(a)(1), Appendix II at II-15. After receiving the complaint, the Commission found reason to believe that the complaint stated a FECA violation, notified CLITRIM/Edward Cozzette of the finding and conducted an investigation of the matter fully within the detailed procedure outlined by Congress in 2 U.S.C. § 437g.

The Commission found "reason to believe" that a FECA violation had occurred on May 12, 1977, notified Edward Cozzette, Chairman of the Central Long Island TRIM Committee of the finding by letter dated May 19, 1977; received a "response" from Edward Cozzette by letter dated June 30, 1977 which refused to answer the Commission's interrogatories; notified Edward Cozzette that it needed factual information to proceed by letter dated July 14, 1977; received another "response" from Edward Cozzette by way of letter dated July 23, 1977 in which Mr. Cozzette stated that he would "accept no further communication from your office;" found "reasonable cause to believe" on August 10, 1977 that a violation of § 441d had occurred; notified Mr. Cozzette of the "reasonable cause to believe" finding and issued an order for Mr. Cozzette to answer the Commission's interrogatries by letter and order dated August 23, 1977; notified Mr. Buck Mann of National TRIM of the Commission's investigation by letter dated August 23, 1977, enclosing the interrogatories also sent to Mr. Cozzette; received a response from Mr. Cozzette by letter dated September

14, 1977 enclosing a copy of a letter from Mr. Mann as partial response to the Commission's interrogatories; found reasonable cause to believe on October 19, 1977 that a violation of § 434(e) had occurred; notified Mr. Cozzette by letter dated October 26, 1977 enclosing a proposed conciliation agreement; received responses from NYCLU/ACLU representing Mr. Cozzette dated 11/23/77, 1/27/78 and 2/10/78; found probable cause to believe on 2/23/78 and authorized the Office of General Counsel to file a civil action.

Thus, it is clear that the Commission precisely followed the enforcement procedure of § 437g in this case. Edward Cozzette, Chairman of CLITRIM was notified of the investigation and was provided ample opportunity to "demonstrate that no action should be taken against" him; the investigation was conducted in confidence; and defendant TRIM was involved in the Commission's conciliation attempts with defendants CLITRIM and Edward Cozzette. Edward Cozzette informed the Commission that the attorney for National TRIM, Mr. Buck Mann, represented CLITRIM in the Commission's investigation. By letter dated August 23, 1977 the Commission informed Mr. Mann and National TRIM of the investigation into the nature of CLITRIM's 1976 Election Bulletins and included interrogatories which the Commission had ordered Mr. Cozzette to answer. Mr. Mann answered the Commission's interrogatories, originally addressed to Mr. Cozzette, by letter dated September 29, 1977. Also, Mr. John Robbins, National Chairman of TRIM and

intervening-defendant in this case, met with Commission staff to discuss MUR 386, the Commission's investigation of CLITRIM's '76 election activities, as it might affect TRIM. Mr. Mann was also present. At this meeting, Mr. Mann disclosed that he had a copy of the Commission's conciliation agreement which had been sent to CLITRIM on October 26, 1977.

The Commission's decision not to formally name TRIM as a respondent in its administrative enforcement proceeding, but instead to name the organization as a necessary party pursuant to Rule 19 of the Federal Rules of Civil Procedure, was reasonable given the fact of TRIM's actual participation in the informal conciliation process. This court's review of the Commission's action in this regard should be governed by the standard of "arbitrary or capricious or otherwise contrary to law." As Judge Parker phrased it in an action brought pursuant to 2 U.S.C. § 437g(a)(9),

> The Court may not substitute its judgment for that of the Commission. Only if the agency acted in a manner which was arbitrary or capricious, was an abuse of discretion or was otherwise contrary to law, should its action be set aside by this Court.

Hampton v. Federal Election Commission, CCH Fed. Elec. Camp. Fin. Guide, ¶ 9036 (D.D.C. 1977); aff'd No. 77-1546 (D.C. Cir. July 21, 1978)(unpublished opinion). Similarly, Judge Richey has recently stated in In Re Federal Election Campaign Act Litigation,

> ... [T]he Court must test the Commission's decision according to the standard commonly applied to judicial

> review of administrative decisions. This standard requires the reversal of agency action which is either arbitrary or capricious. The sensitive nature of the Commission's decision certainly calls for judicial deference to the expertise of the agency which Congress has empowered to enforce the election laws. By reversing only those decisions which are arbitrary or capricious, the Court provides this deference.

MDL Docket No. 372, Misc. No. 79-0136 (D.D.C June 15, 1979): Accord, National Conservative Political Action Committee v. Federal Election Commission, supra note 14. Only if the Commission's lengthy investigation in this matter culminating in the filing of a civil action to enforce the statute was arbitrary or capricious should it be deemed by this court as contrary to law.

Second, it is clear that the application of FECA's §§ 434(e), 441d to CLITRIM/TRIM's election activities is constitutional. These activities, as evidenced by the TRIM Bulletins, were specifically designed to expressly advocate the election or defeat of clearly identified candidates. The bulletins discuss the issue of high taxes/big government, make clear TRIM's position on the issue, identify federal candidates, interpret their position on the issue of high taxes/big government and urge the voter to vote with TRIM. The Commission interprets these communications as "express advocacy" communications within the meaning of 2 U.S.C. § 434(e), 11 C.F.R. § 109.1(b)(2), Buckley v. Valeo, 424 U.S. at 44 n.52. To so severely limit "express advocacy" to require that the precise "magic words" suggested in Buckley's "footnote 52" be

included in "express advocacy" communications is to allow individuals and groups "to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act." Buckley, 424 U.S. at 76. Such a construction of the statute is consistent with the Supreme Court's Buckley holding.

Although the district court concludes its Findings by equating the educational and social activities of groups such as the American Civil Liberties Union, the New York Civil Liberties Union, the United Church of Christ and Public Citizen with the "leafleting activity undertaken by CLITRIM, Conclusion at 82, Appendix I, the Commission maintains that this conclusion is not supported by the facts. The CLITRIM/ National TRIM bulletins are not merely information or educational compilations of congressional voting records. The bulletins not only record congressional votes but they also evaluate the members of Congress as having "Voted for Lower Taxes and Less Government" or "Voted for Higher Taxes and More Government." Finding No. 16 at 20, Appendix I. National TRIM has admitted that the goals of the bulletins were to get the voters to "connect your representative's name and face with his voting record" and to "(1) unseat...a liberal representative, (2) unseat...or chang[e] the voting pattern of a 'moderate' representative, or (3) strengthen...a conservative representative." Finding No. 19 at 21, Appendix I. In addition,

National TRIM referred to its Fall '76 issue of the TRIM Bulletin as the "election issue," asked that each local TRIM Committee "print and distribute at least 20,000 copies...," noting that "Election Day, November 2, will be upon us much sooner than we would like." Finding No. 22 at 22, Appendix I. Finally, National TRIM took credit, following the 1976 election, for certain election results, noting that "'big spenders' had a tough time getting re-elected and some didn't make it. We think the reason -- the TRIM Bulletin." Finding No. 25 at 24, Appendix I.

Thus, CLITRIM's '76 Election Bulletin is express advocacy of the election or defeat of clearly identified federal candidates as defined by Congress in 2 U.S.C. § 441d; by the Commission in its regulation, 11 C.F.R. § 109.1(b)(2); and by the Supreme Court in Buckley v. Valeo, 424 U.S. 1, 44. The Supreme Court, in Buckley, held that it is constitutional to apply FECA's limited disclosure mandates such as 2 U.S.C. §§ 434(e), 441d, to such activities.

Moreover, the requirements of § 434(e) regarding reporting and disclosure have been distorted by defendants. Defendant CLITRIM, if it is not, as it avers, a political committee, by expressly advocating the election or defeat of a federal candidate in its CLITRIM election bulletin and by spending in excess of $100 in that regard, would be required by § 434(e) to report only those expenditures related to the express advocacy communication. Defendant TRIM would likewise be limited in

its disclosure responsibilities, assuming that it is not a political committee, under § 434(e) to reporting only those contributions or expenditures in connection with their TRIM Bulletins which expressly advocate. The John Birch Society, if it, as it states, engages in only educational activities, would not be required to report and disclose anything under § 434(e). These disclosure provisions were specifically enacted by Congress to provide a more limited impact on groups "expressly advocating" than the full disclosure requirements imposed on political committees.[44/]

If one analyzes the exact disclosure required by 2 U.S.C. §§ 434(e), 441d, it is difficult to imagine how TRIM could be adversely impacted at all. First, § 441d would require TRIM, not the John Birch Society, to identify itself on its TRIM Bulletins which contain "express advocacy communication" as having financed the bulletins, e.g.,

> This bulletin is not authorized by any candidate but was financed by Tax Reform Immediately.

Section 441d notifications need not contain names of individual contributors to TRIM and need not even contain the name of TRIM's parent organization, the John Birch Society,

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44/ Although the district court Findings include several statements as to the activities of other organizations not parties to this action, this court should certainly not render a decision outlining the constitutional ramifications of the application of FECA to these groups on such a bare record.

much less the names of contributors to the John Birch Society.

In addition, for TRIM Bulletins which contain "express advocacy," TRIM, again assuming that TRIM is not now, or does not in the future become, a political committee, would be required to file an FEC Form 5, a one page form requiring disclosure of TRIM's name and address, whether the "expressly advocacy" expenditure was in support of or in opposition to a federal candidate, and the full name of the payee to whom the independent expenditure was made, the type of expenditure, the date, the amount and the name(s) of federal candidates expressly advocated. Thus, using CLITRIM's '76 Election Bulletin as an example, CLITRIM needed only to disclose its name and address; the amount of the expenditure ($135.); the payee-- Printer; type of expenditure -- for printing; the date of the expenditure; and the name of candidate(s) advocated. How could this information possibly result in harassment of CLITRIM or its members or officers or even more remotely harassment of National TRIM or the John Birch Society.[45/] By complying with the statute, public disclosure would have been effected prior to the 1976 election with almost no impact on CLITRIM. In sum, the governmental interests underlying §§ 441d and 434(e) are substantial and directly served, the disclosure required is extremely limited, and the generalized threat

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45/ See discussion of "harassment" supra at 27.

of any harm possibly flowing from compliance with these provisions is at best difficult to identify. Clearly such a disclosure requirement is constitutional as applied to CLITRIM or National TRIM.[46/]

46/ The district court also identified, as an issue of statutory construction, whether the TRIM bulletins should be exempt from compliance with 2 U.S.C. §§ 434(e), 441d because they come within the statutory exception at 2 U.S.C. § 431(f)(4)(A), 11 C.F.R. § 100.7(b)(3). These provisions are set forth in full in the Commission's Appendix II at II-4, II-25. The district court concluded that if "deciding the question of statutory and regulatory interpretation, this court would determine that the TRIM bulletins did not fall within the exemption language." The Commission concurs. Congressional debate during consideration of the Taft Hartly Act (Labor Management Relations Act of 1947), 61 stat. 159, which amended § 315 of the Federal Corrupt Practices Act of 1925 to include labor unions, supports the district court's conclusion that the exception was intended to apply only to bona fide newspapers or publications which "get their money from advertising" or from subscribers. 93 Cong. Rec. S6436 (daily ed. June 5, 1947).

> So far as I know no one has ever thought that a corporation could publish a pamphlet for one candidate as against another without violating the Corrupt Practices Act. No one has ever considered that could be done. They could not publish a special newspaper for that purpose under the previous law because the previous law prohibited any contribution, direct or indirect, in connection with any election at which a man was a candidate for public office.

Id. (Remarks of Sen. Taft). Courts have defined "periodical" as used in other federal statutes to require the element of "periodicity" and to include "a variety of original articles by different authors." Smith v. Hitchcock, 226 U.S. 53 (1912); Houghton v. Payne, 194 U.S. 88 (1904). See also 39 U.S.C. § 4354 (definition of "mailable periodical for purposes of second-class mail privileges); 15 U.S.C. § 1802 (definition of "newspaper publication" for purposes of the Newspaper Preservation Act of 1970).

The district court also certified a question as to whether the Commission's regulation, 11 C.F.R. § 109.1(b)(2), Appendix II at II-25, is constitutional as applied to CLITRIM's distribution of the '76 Election Bulletin. Finding Nos. 29 and 30 at 25, Appendix I. As discussed fully, supra, the Supreme Court in Buckley interpreted § 434(e) to meet constitutional requirements:

> We agree that in order to preserve the provision against invalidation on vagueness grounds, § 608 (e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.

Buckley, 424 U.S. at 44.

> This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as "vote for," "support," "cast your ballot for," "Smith for Congress,""vote against,""defeat," "reject."

Id. at 44 n.52.

> To insure that the reach of § 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(e)-- to reach only funds used for communications that expressly advocate.

Id. at 80.

Thereafter, Congress re-enacted 2 U.S.C. § 434(e) to be constitutionally consistent with Buckley and entrusted the Commission with the duty and responsibility for interpreting, administering, and enforcing the election laws. 2 U.S.C. §§ 437c

(b)(1), 437d(a)(8), 438(a)(10), Appendix II.[48/] See also, Cort v. Ash, 422 U.S. 66 (1975). Pursuant to this statutory authority, the Commission published regulations in the Federal Register on May 26, 1976, 41 FR 21572, noticing proposed rulemaking, including the entire text of the regulations, announcing scheduled hearings, including dates and times, and inviting testimony and comments on the proposed regulations. On Wednesday, June 9, 1976, the Commission held open, public hearings on Part 109, Part 110, and Part 111 of the proposed regulations. On July 29, 1976, Parts 100-115 of the proposed regulations were debated and approved by the Commission. On August 3, 1976, the Commission, in accordance with 2 U.S.C. § 438(c), transmitted the regulations to Congress. On August 25, 1976, the Commission announced in the Federal Register, 41 FR 35953, its adoption of the regulations and their transmission to Congress. On October 2, 1976, Congress adjourned sine die prior to the passage of the thirty legislative day review period. 2 U.S.C. § 438(c)(2). On January 11, 1977, the Commission again transmitted the regulations to Congress. As House Document No. 95-44, (95th Cong., 1st Sess., (1977)), indicates, the Commission's transmission "packet" included: (1) the Chairman's letter to the Speaker of the House of Representatives; (2) the proposed regulations; and (3) an explanation and justification statement. The thirty legislative day period having

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48/ See discussion of the legislative history of §434(e) supra at 14 and of FECA's enforcement procedures supra at 30.

run, the Commission prescribed the regulations on April 13, 1977, and published notice of the promulgation in the Federal Register, 42 FR 19324 (April 13, 1977).

The challenged regulation, 11 C.F.R. § 109.1(b)(2), was part of this original promulgation of regulations which was on the public record as early as May 26, 1976. The provision is clearly constitutionally sufficient. First, § 109.1(b)(2) reads as follows:

> (2) "Expressly advocating" means any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expression such as "vote for," "elect," "support," "cast your ballot for," and "Smith for Congress," or "vote against," "defeat," or "reject."

This provision does not extend beyond the constitutional limits set forth by the Supreme Court in Buckley and is therefore constitutional, i.e., "including but not limited to" is not broader than "such as." See Buckley footnote 52 set forth, supra. The regulation was submitted to Congress and prescribed by the Commission pursuant to 2 U.S.C. § 438 and therefore the regulation should be accorded the same presumption of constitutionality as any federal statute. Town of Lockport, 430 U.S. at 279. To find § 109.1(b)(2) unconstitutional is to overrule Buckley v. Valeo, supra.

Second, the application of 11 C.F.R. § 109.1(b)(2) to CLITRIM's distribution of the '76 Election Bulletin in October, 1976 is clearly not a violation of the constitution's proscription against the passage of any ex post facto law. U.S. Const. art. I, Sec. 9, cl. 3. This is clearly the case since, as described, supra, the regulation merely mirrors the statute, 2 U.S.C. §§ 434(e), 441d,

which became effective May 11, 1976 and the Supreme Court's construction of the statute in Buckley, which was rendered January 30, 1976. Defendants had adequate notice of the law prior to their "express advocacy" activities conducted in October, 1976. Also, the regulation itself was on the public record as early as May 26, 1976.

Additionally, the application of 11 C.F.R. § 109.1(b)(2) cannot violate the ex post facto law prohibition since this is a civil not a criminal enforcement action undertaken by the Commission in the exercise of its exclusive primary jurisdiction for enforcement of FECA. The constitutional prohibition against ex post facto legislation has been consistently interpreted to encompass only those laws and regulations prescribed thereunder which seek to impose or increase criminal liability and penalties for conduct previously considered lawful. Harisiades v. Shaughnessy, 342 U.S. 580 (1951). The Supreme Court detailed the parameters of the ex post facto prohibition:

> (1) Every law that makes an action done before the passage of the law, and which was innocent when done, criminal and punishes such action. (2) Every law that aggravates a crime or makes it greater than it was when committed. (3) Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. (4) Every law that alters the legal rules of evidence and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

Courts are reluctant to apply the constitutional prohibition to retrospective application of legislation which imposes only civil liability, Bankers Trust Co. v. Blodgett, 260 U.S. 647 (1923), but the constitutional mandate has been invoked where the courts determine that the civil liability is in actuality a criminal penalty in disguise.[49/] In the words of the Court, the constitutional prohibition against ex post facto legislation "may not be evaded by giving a civil form to a measure which is essentially criminal." Burgess v. Salmon, 97 U.S. 381, 385 (1878). See also United States v. An Article of Food Consisting of Cartons of Swordfish, 395 F. Supp. 1184 (S.D.N.Y. 1975).

The regulatory and enforcement provisions of the Act as set forth in 2 U.S.C. § 437g permit the Commission to seek, in conciliation, civil penalties for violation of various sections of the Act and to institute civil action for relief. The constitutionality of these provisions were challenged in Federal Election Commission v. Weinstein, 462 F. Supp. 243 (S.D.N.Y. 1978), where defendants argued that the civil penalties were "criminal penalties in disguise," citing the Swordfish decision as precedent. The court rejected defendants contention and found that FECA's civil penalty provisions were not criminal in disguise and therefore the ex post facto prohibition was inapplicable. Id. at 252.

49/ See also, Shawson, "Constitutional and Legislative Consideration in Retroactive Lawmaking," 48 Calif. L. Rev. 216, 225 (1960).

While administrative agencies are not exempt from the constitutional ban on ex post facto laws, United States v. WHAS, Inc., 253 F. Supp. 603, 606 (W.D. Kent. 1966), the constitutionality of administrative regulations and rulings are generally determined under a due process standard of reasonableness after a balancing of interests. Summit Nursing Home, Inc. v. United States, 572 F.2d 737 (Ct.Cl. 1978). Factors used to determine whether it is permissible to enforce newly adopted administrative rules retrospectively include:

(1) whether the particular case is one of first impression;

(2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law;

(3) the extent to which the party against whom the rule is applied relied on the former rule;

(4) the degree of burden which a retroactive order imposes on a party; and

(5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft Corp., 534 F.2d 422, 452-3 (2d Cir. 1975); cert denied 429 U.S. 825 (1975), citing Retail, Wholesale and Dept. Store Union, AFL-CIO v. National Labor Relations Board, 466 F.2d 380, 390 (D.C. Cir. 1972).

FECA's regulations would clearly be accorded retroactive application under these criteria, especially since they are

the initial regulations promulgated under the statute. See Davis, Administrative Law Treatise § 5.08 at 342 (1958). The courts have also recognized that interpretive regulations must initially be retroactive. The Supreme Court upheld the retroactive application of a new tax regulation, stating that the regulations "pointed the way for the first time, for correctly applying the antecedent statute to a situation which arose under the statute." Manhattan General Equipment Company v. Commissioner, 297 U.S. 129, 135 (1936). The United States Court of Claims, cited the Manhattan decision in support of its determination that "[a]lthough not all regulations can be applied retroactively, the first regulation promulgated under a statute. . . is properly applied retroactively." Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Ct. Cl. 1978).

Therefore, since the challenged regulation does not extend beyond the statute which was enacted as of May 11, 1976 nor beyond Buckley which was decided on January 30, 1976; since the regulation was published as early as May 26, 1976; since it is merely a civil not a criminal enforcement provision; and since the regulation meets the standards set down by federal courts for retroactive application, to apply 11 C.F.R. § 109.1(b)(2) to CLITRIM's election activities in October, 1976 does not violate the Constitution.

CONCLUSION

For reasons set forth herein, this court should conclude that FECA's limited disclosure provisions, 2 U.S.C. §§ 434(e), 441d and FECA's enforcement provision, 2 U.S.C. § 437g, are consistent with the requirements of the Constitution of the United States. Although the Commission maintains that the application of these provisions and the application of the Commission's regulation, 11 C.F.R. § 109.1(b)(2), to defendants herein are also constitutional, these questions were not properly certified pursuant to 2 U.S.C. § 437h and therefore should be returned to the district court for determination during the Commission's enforcement action.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL ELECTION COMMISSION, Plaintiff, v. CENTRAL LONG ISLAND TAX REFORM IMMEDIATELY COMMITTEE, et al., Defendants.	)	No. 79-3014

CERTIFICATE OF SERVICE

This is to certify that I caused to be served by Air Express on October 8, 1979, two copies of the Federal Election Commission's Brief, Appendix to the Brief, and Motion to Exceed Page Limitation to the following counsel:

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